BALAKRISHNAN KUNJAMBOO NAIR

v.

SAVASTINE ANTHONY FRANCIS

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 740 OF 1982]
19 OCTOBER 1990

DAMAGES: *Loss of earnings - No documentary evidence produced - Judicial notice - Fracture shaft of right femur and right brachial plexus injury.*

CIVIL PROCEDURE: *Initial agreement to bundle of documents - Subsequent withdrawal of agreement - Circumstances of case - Scratch mark.*

TORT: *Negligence - Sketch plan and key - Scratch mark - Scene of accident - Principles of encroachment - Contributory negligence.*

The accident in this case occurred at the 4½ miles Ipoh-Kuala Kangsar Road on 8 August 1981, between the plaintiff B who was riding his motorcycle and a van driven by the 1st defendant; the van belonged to the 2nd defendant, D2. The issues for dispute were liability, general damages and loss of income.

Prior to the hearing, B's Counsel had advised the Court that D1's police report in the agreed bundle was subject to cross-examination and that the sketch plan and key of the bundle was not agreed to. The defendants Counsel objected and the Court held that taking into account the date of the accident and the numerous postponements, it was too late for B to now withdraw his agreement to the police report, sketch plan and key. Both parties alleged that the other had encroached into his path while overtaking another vehicle.

Held:

[1] The sketch plan clearly indicates that the scratch mark HI which was forty-six feet long was entirely on D1's side of the road and this only confirms that the accident must have taken place on D1's side.

[2] D1's allegation that the plaintiff's motorcycle was in the centre of the road after the impact had also to be rejected since the sketch plan was part of the agreed bundle and cannot be disputed.

[3] (a) Taking into account the distance travelled by D1's van from the time of impact up to the spot it landed meant that he was travelling at a much faster speed; if he had seen the plaintiff's motorcycle overtaking and encroaching thirty feet away, he could surely have, at the speed he stated, taken remedial steps to avoid any collision since he had also said that he had swerved to the left.

(b) In the circumstances, although it was the plaintiff who had encroached into D1's path, D1 was still liable in contribution and his liability was assessed at 25%.

(c) Each case involving encroachment would have to depend on its facts and on the facts of this case, the encroacher was only 75% liable.

[4] (a) In relation to the claim for loss of monthly income no documentary evidence was produced either in the form of income tax returns or employers' records as the relevant company had ceased operations.

(b) In the absence of any documentary evidence, judicial notice could be taken of the average earnings of marble grinding contract workers to be in the region of about RM700.

[5] (a) For the right brachial plexus injury, considering the medical opinion and the case of *Wong Yee Cheong & Anor. v. Toh Seng Chuan* [1988] 2 CLJ (Rep) 555, the residual disability here was more severe; an award of RM50,000 was held to be fair and reasonable.

(b) Applying the relevant case law for the fracture shaft of the right femur with 4 cm shortening, an award of RM20,000; also an award of RM1,000 for the multiple abrasions and one inch laceration over the right leg was made.

[Order accordingly.]

Cases referred to:
Tajuddin bin Sheikh Daud v. Wong Kim Yin [1989] 2 CLJ (Rep) 546
Seow Gek Soo alias Yeo Gek Soo (m.w.) & Anor. v. Chia Mun Fook [1989] 2 CLJ (Rep) 447
Lim Gaw Teong & Anor. v. Daniel & Anor. [1968] 1 MLJ 277
Taharuddin bin Ahmad v. Leo Moi & Anor. [1989] 2 CLJ (Rep) 543
Ng Eng Wah v. The Getz Corporation (Singapore) Sdn. Bhd. [1989] 2 CLJ (Rep) 1036
Yahaya bin Mat & Anor. v. Abdul Rahman bin Abu [1982] 1 MLJ 202
Wong Yee Cheong & Anor. v. Toh Seng Chuan [1988] 2 CLJ (Rep) 555
Mohamed Shariff v. Haji Zainal Abidin [1986] 1 MLJ cxxxii
Mohandas s/o Lachiram v. Tahir bin Mat Yassin [1986] 2 MLJ ccx
Wong Yeen Pen v. Sharifudin bin Yusof [1989] 2 CLJ (Rep) 655
Koh Hung Keng v. Low Pee Lorry Transport Co. Ltd. [1967] 1 MLJ 6

For the Plaintiff - Darshan Singh Gill; M/s. Darshan Singh Gill & Co.
For the Defendants - Prakash Menon; M/s. Isharidah, Ho, Chong & Menon

JUDGMENT

Abdul Malek Ahmad J:

The plaintiff had claimed from the defendants special and general damages for the injuries sustained by him as a result of the accident between his motorcycle AT 2562 and the second defendant's motor van AAM 6236 driven by the first defendant on 8 August 1981 at about 4 p.m. at the 4 1/2 milestone Ipoh-Kuala Kangsar road. Special damages agreed to at the outset were made up of RM40 for the medical report, RM400 for the specialist report and X-rays, RM22 for the police documents, RM10 for the RIMV report and RM300 for the travelling expenses to the General Hospital Ipoh and the General Hospital Kuala Lumpur for treatment. Only one item of special damages, which was for loss of income at RM1,000 per month for sixteen months and continuing, had not been agreed to. Similarly, liability and general damages were also disputed.

Before the hearing began, learned Counsel for the plaintiff had told the Court that the first defendant's police report at p. 1 of the agreed bundle was subject to cross-examination and that the sketch plan and key at pp. 2 and 3 of that agreed bundle were not agreed to. Learned Counsel for the defendants expectedly objected to this statement and the Court agreed with him considering the date of the accident (8 August 1981), the date of filing of the writ (11 December 1982), the date of filing of the agreed bundle (4 June 1983) and the numerous postponements. It was too late in the day in the circumstances for the plaintiff to now withdraw his agreement to the first defendant's police report and the police sketch plan and key as

this would have entailed further adjournments to get the relevant witnesses to appear.

The plaintiff had given evidence that he was riding his motorcycle at 30 miles per hour, four feet from both the left edge and centre white line of the road from Ipoh to Kuala Kangsar, which was a straight road, with PW2 as pillion rider when a van from the opposite direction had overtaken a bus, which had stopped, and had collided into his motorcycle despite the plaintiff having braked to swerve left to avoid the collision. The plaintiff had lost consciousness at the scene and had subsequently found himself at the General Hospital Ipoh.

When he was told that his right hand had to be amputated, the plaintiff had chosen to discharge himself. He told the Court that his right hand was now totally useless and because of the injury to his right leg, he could only walk with a limp. Before the accident, he was a grinding contractor for a marble factory with four workers under him and his income was RM1,000 a month. After the accident, he was not able to get employment at all except for a one-year stint as watchman at Dato Samy Vellu's house at RM300 per month which he got out of sympathy. Because of financial difficulties, he had withdrawn his Employees Provident Fund, had taken a loan from his wife's life insurance policy and had borrowed from friends to cover the cost of operations and living expenses. His evidence as regards the accident and earnings was corroborated by PW2. As regards the sketch plan, the plaintiff testified that he did not agree with it while PW2 had stated that it was wrong as regards the position of the motorcycle after the accident. In answer to the Court, PW2 had admitted that he did not actually see the collision but had only heard the sound of the impact.

The first defendant's version was that the accident had happened on his side of the road when the plaintiff's motorcycle from the opposite direction had overtaken a van in the same direction and had encroached into his path. The first defendant said he applied his emergency brakes and swerved left on seeing the motorcycle thirty feet away but the van which he was driving at thirty miles per hour went forward resulting in the head-on collision. After the impact, the plaintiff's motorcycle was in the centre of the road and his van went about twenty feet off the road. The first defendant denied overtaking any bus. Under cross-examination, he stated that the van overtaken by the plaintiff had given its signal to turn left into a junction and in answer to a question by the Court, he said that the van had already turned halfway into the junction when the plaintiff overtook it. The sole passenger in the first defendant's van did not give evidence as he did not turn up after having appeared in Court in the past without the case going on.

Essentially, both versions were similar in substance. The plaintiff alleges that the first defendant had encroached into his path while overtaking a bus while the first defendant insists that the plaintiff had come onto his side of the road while overtaking a van. However, the sketch plan clearly indicates that the scratch mark HI which was forty-six feet long was entirely on the first defendant's side of the road and this only confirms that the accident must have taken place on the first defendant's side. I had accepted the sketch plan as it was part of the agreed bundle despite learned Counsel for the plaintiff's application at the commencement of the trial to take it out from the bundle as my view was that the application was unreasonable at such a late stage. In the same breath, the first defendant's allegation that the plaintiff's motorcycle was in the centre of the road after the impact had also to be rejected since the sketch plan was part of the agreed bundle and cannot be disputed.

However, the distance travelled by the first defendant's van from the time of impact up to the spot it landed totalled 96 feet 5 inches altogether made up of HI, FD1 and FE4 at 46 feet 5 inches, 26 feet and 24 feet respectively. This only meant that the first defendant's van could not have been driven at a speed of thirty miles per hour as claimed by the first

defendant considering the first defendant's testimony that he had also applied emergency brakes. He must have been travelling at a much faster speed. If he had seen the plaintiff's motorcycle overtaking and encroaching thirty feet away, he could surely have at the speed he stated taken remedial steps to avoid any collision since he had also said that he had swerved to the left. In the circumstances, my considered opinion was that although it was the plaintiff who had encroached into his path, the first defendant was still liable in contribution and assessed his liability at 25%.

I certainly would have dismissed the plaintiff's claim altogether if not for these considerations as had been decided in a number of cases where the "encroacher" had been found to be 100% liable as in *Tajuddin bin Sheikh Daud v. Wong Kim Yin* [1989] 2 CLJ (Rep) 546, *Seow Gek Soo alias Yeo Gek Soo (m.w.) & Anor. v. Chia Mun Fook* [1989] 2 CLJ (Rep) 447, *Lim Gaw Teong & Anor. v. Daniel & Anor*. [1968] 1 MLJ 277, *Taharuddin bin Ahmad v. Leo Moi & Anor.* [1989] 2 CLJ (Rep) 543 and *Ng Eng Wah v. The Getz Corporation (Singapore) Sdn. Bhd.* [1989] 2 CLJ (Rep) 1036. However, in *Yahaya bin Mat & Anor. v. Abdul Rahman bin Abu* [1982] 1 MLJ 202, the High Court had found the encroacher 70% liable but the Federal Court had changed that to one-third liable as the other party was found cycling with an open umbrella sideways in heavy rain which substantially affected his vision. Each case involving encroachment would certainly therefore have to depend on its facts and on the facts of this case, I found the encroacher to be only 75% and not 100% liable.

As for quantum, as had been stated earlier, items 1, 2, 3, 4 and 6 of special damages had been agreed to respectively at RM40, RM400, RM22, RM10 and RM300. For item 5 of special damages, the plaintiff had testified that he was doing a marble grinding contract with four workers under him which earned him RM1,000 a month. No documentary evidence was produced either in the form of income tax returns or employers' records as the relevant company had ceased operations and learned Counsel for the defendants had submitted that at the most it would be reasonable for the plaintiff to earn about RM400 to RM500 a month. Learned Counsel for the plaintiff maintained that the plaintiff could get RM25 a day for 26 working days in a month amounting to RM650 but that he also earned RM200 for supervising the workers. My view was that in the absence of any documentary evidence, I could take judicial notice of the average earnings of marble grinding contract workers to be in the region of about RM700 per month and made this award for two years totalling RM16,800 up to August 1983. From then, the plaintiff had worked as watchman for twelve months at RM300 per month. For that period, I accordingly deducted the RM300 he had earned and awarded him RM4,800. For the remaining six years of the pretrial period, as already three years had elapsed, I would think that the plaintiff should actually be in a position to mitigate his damages as he had done in the third year and consequently gave an award of RM400 x 72 totalling RM28,800. In the result, the total award for items 5 of special damages came to RM50,400.

Accordingly, the award for loss of future earnings at RM400 on a multiplier of 11, as the plaintiff was aged 39 at the time of the trial, was RM39,870 having rounded it up from RM39,870.78 as appearing in the annuity tables. For the fracture shaft of the right femur and the right brachial plexus injury, it is relevant to reproduce the opinion of the orthopaedic surgeon at the Ipoh Specialist Centre in his report dated 4 August 1983 as it appears in the agreed bundle. It states:

> This man suffered severe injuries to his right arm and right leg.
>
> The right arm is almost totally paralysed, the only movement present being mild degree of flexion of wrist, thumb and fingers. This has been due to injury to the plexus of nerves that supply the limb. The paralysis is completely useless. In fact, it is worse than having the arm

amputated, as:

1. He will experience pain, sometimes excruciating in nature, in that arm.
2. He can injure himself by burns etc., the area of the arm that lacks sensation and not realise that he has suffered injury.

The fracture in the right femur has united but there is deformity and 4 cms of shortening. This will be permanent and as a result he will limp.

For the right brachial plexus injury, considering the medical opinion and the case of *Wong Yee Cheong & Anor. v. Toh Seng Chuan* [1988] 2 CLJ (Rep) 555, where for a similar injury but where the plaintiff is still able to flex his elbow up to 60% of that of a normal person the award was RM40,000 on 1 March 1988, I found that the residual disability here was more severe and held that an award of RM50,000 would be fair and reasonable.

For the fracture shaft of the right femur with 4 cm shortening, I was guided by *Mohamed Shariff v. Haji Zainal Abidin* [1986] 1 MLJ cxxxii (where the award in 1984 for a 3.5 cm shortening and fracture of the left femur was RM12,000), *Mohandas s/o Lachiram v. Tahir bin Mat Yassin* [1986] 2 MLJ ccx (where the award in 1986 was RM20,000 for shortening of 4 cm and where the fracture was broken into 22 radiologically identifiable pieces), *Wong Yeen Pen v. Sharifudin bin Yusof* [1989] 2 CLJ (Rep) 655 (where RM40,000 was awarded for fractures of both legs in 1989) and *(Seow Gek Soo alias Yeo Gek Soo (m.w.) & Anor. v. Chia Mun) Fook* (*supra*) (where RM22,000 was awarded by me for a similar injury in 1989), and made an award of RM20,000 which was also the figure considered fair for this injury by learned Counsel for the defendants in his submissions. I had also made an award of RM1,000 for the multiple abrasions and one inch laceration over the right leg.

Interest was awarded as usual at 4% on special damages from the date of accident to the date of judgment and at 8% on general damages from the date of service of the writ to the date of judgment. The interest on general damages does not apply to the award for future losses. Costs are to be taxed accordingly.

Also found at [1991] 1 CLJ 503